No. 12278

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LESTER W. HURLEY,

Appellant,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LIMITED,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

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Introductory Statement.

For clarity, we will, in this brief, sometime refer to appellant as plaintiff and to appellee as defendant.

This brief of defendant consists of two divisions, Division One, in which reply will be made to each of the nine sections of argument contained in plaintiff's brief and, Division Two, in which defendant will point out several conclusions of law which are believed by defendant to be erroneous and which resolved in defendant's favor would, in any event, necessitate an affirmance of the judgment herein.

Analysis of Brief of Appellant.

An examination of the brief of appellant reveals that only one major argument is presented, namely—that the provisions of Section 1475 of the Civil Code of the State of California are not applicable in the instant case (Appellant's Brief p. 7). Sections I, II, III, IV, V, VI, VII and IX are all directed to this general proposition.

Section I of the argument is that since the defendant did not plead the provisions of said code section in so many words in its answer, such defense is not available to it.

Sections II, IV, V and VII all urge the inapplicability of said section of the code based upon the contention that despite the trial court's finding to the contrary, defendant had actual or constructive knowledge of a fraud perpetrated upon the plaintiff by his grandmother and uncle.

Section III of the argument urges the inapplicability of said section upon the asserted ground that proceeds of joint tenancy property do not retain joint tenancy characteristics.

In Section VI, plaintiff argues that the dividends and stock rights in question were *deposits* in the hands of defendant and thus expressly excluded from the provisions of Civil Code, Section 1475.

Plaintiff contends, in Section VIII that, assuming said section not applicable, he would be entitled to interest from the date dividends were declared rather than from the date of his demand upon defendant.

In his concluding Section IX, plaintiff argues that said Section 1475 of the Civil Code cannot apply for the reason that the plaintiff was once a minor.

DIVISION ONE.

REPLY TO BRIEF OF APPELLANT.

I.

The Defense of Payment by Defendant to One of Several Joint Tenants Was Presented and Litigated Throughout the Trial.

Plaintiff alleged in his complaint that he had become a joint tenant with his grandmother and uncle in certain shares of stock of the defendant [Tr. Rec. p. 3] but that the defendant paid dividends and issued stock rights on the shares in question to Elizabeth J. Price, his grandmother which said acts he charged to be illegal and unlawful [Tr. Rec. p. 10].

In the answer of defendant, it is admitted, in essence, that the joint tenancy interest had been created in the stock [Tr. Rec. p. 20] and it is admitted that the dividends and stock rights arising in connection with said stock had been paid or delivered to the grandmother, Elizabeth J. Price, but it is denied that such payments or distributions had been illegal and unlawful or illegal or unlawful [Tr. Rec. p. 21].

It is submitted that the foregoing pleadings clearly presented to the trial court for decision the issue as to whether defendant's performance of its obligations to the one joint tenant, Mrs. Price, also satisfied any obligation it had to the joint tenant, Hurley.

Furthermore, prior to a pretrial hearing held by order of the District Court in June, 1946, defendant stated concisely in its memorandum of points of law which it intended to rely upon at the trial that: "The payment by defendant of the dividends accruing to one of the several

joint owners of the stock discharged defendant's liability to all of said owners" [Tr. Rec. p. 33]. (In this connection, note that the date September 23, 1949, appearing in the transcript is the date upon which this portion of the record was added to the transcript and not the date upon which the point was made and submitted in the lower court.)

In any event, the issues upon which this cause went to trial more than three years ago were necessarily framed by defendant's answer to the plaintiff's own allegations. As above pointed out, plaintiff alleged his original joint tenancy interest which defendant admitted; plaintiff alleged that he was wrongfully deprived of this interest by the forgery and fraud of his grandmother and uncle which defendant denied; and plaintiff alleged illegal and unlawful payment of dividends and issuance of stock rights to his grandmother which illegality and unlawfulness defendant denied.

Section 1475 of the California Civil Code is a statement of the California law applicable to a factual situation. Plaintiff's contention throughout the years this matter has been pending has been and now is that he, at all times, remained a joint tenant of the stock involved and he, at all times, has admitted that the defendant paid all dividends on such stock and issued all stock rights in connection therewith to Mrs. Price. It is purely a question of law whether the defendant, in so doing, discharged its obligation to all joint tenants.

Plaintiff entitled his action herein one for an accounting. It is held that such an action is unique in that the issues raised by the pleadings may be only those with rela-

tion to the existence of a relationship which requires an accounting. Any credits proved by the defendant in such an action may be properly considered.

Whann v. Doell, 192 Cal. 680 at 684, 221 Pac. 899;

Davis v. Calif. Motors, 73 Cal. App. 2d 241 at 245-6, 166 P. 2d 52.

Likewise, when a payment is shown in the plaintiff's complaint, as was the case herein, there is no reason for the defendant to plead the same.

48 C. J. 667, Note 28.

II.

Plaintiff Is Concluded by the Finding of the Trial Court That Defendant Had No Knowledge, Actual or Constructive, of Any Fraud.

As we have previously commented, Sections II, IV, V and VII of appellant's argument are devoted to the contention that this defendant had both actual and constructive knowledge of the fraud of his grandmother. In this portion of our brief we will reply to each of these sections.

In this connection, the trial court found as follows [Tr. Rec. p. 57]:

> "That defendant had no actual knowledge of the fraud hereinbefore found to have been perpetrated upon Lester W. Hurley by his grandmother, either at the time said fraud was perpetrated or thereafter, and the court further finds that defendant has no reason to believe that any fraud was being, or had been, so perpetrated."

In the sections of appellant's brief above noted, appellant challenges Conclusion of Law XI [Tr. Rec. p. 62]

to the effect that defendant had discharged its obligations to the plaintiff joint tenant by its payment of dividends to and delivery of stock rights to or upon the order of his joint tenant Elizabeth J. Price. Appellant argues, *in the face of the finding of fact quoted above,* that the conclusion of law was incorrect in that defendant did have actual or constructive notice of the fraud.

We should observe at the outset that appellant has not included in the Transcript of Record any evidence or testimony which was received by the trial court on this issue of fact and we respectfully contend that in the absence thereof the finding of the trial court is conclusive.

A. In Section II of his argument, appellant asserts that since defendant admitted that it had made payment to one of several joint tenants, it must follow that defendant had knowledge of fraud practiced upon him by another co-tenant.

As we understand this contention of appellant, he argues that since defendant made payments to one joint tenant after it had received purported assignments of certain of the stock, found to be forgeries in an action to which defendant was not a party, defendant must have had knowledge of the assumed fraud by which these assignments were forged.

With all due respect, the complete answer to this contention is that the trial court found that the defendant had no knowledge, actual or constructive, of such fraud. The simple and admitted facts are that the defendant did make payments to one of several joint tenants believing that said joint tenant had, by properly executed documents, obtained the exclusive right to the payments and distribu-

tions made; but this belief cannot be tortured into knowledge of any fraud.

B. Appellant next, in Section IV of his argument, reasons that since defendant had received purported assignments which were forgeries, it was charged with knowledge that they were forgeries and therefore must be charged with knowledge that they were obtained by fraud.

This is the same argument that appellant made under Section II of his brief. In Section II he states that defendant had knowledge of fraud because it admits that it paid to one of several joint tenants; in Section IV, he argues that guilty knowledge must exist because certain assignments which defendant thought to be valid were, in fact, forgeries.

Once again we say that the trial court has found that defendant had no knowledge of any fraud, actual or constructive.

Appellant is now in the position where he concedes that if there had been no forged assignments, the defendant would be completely protected by proof of its performance to one joint tenant. He continues, however, to claim that since there were forged assignments involved which defendant believed to be genuine, defendant is nevertheless bound to know that the assignments were spurious and hence charged with knowledge of fraud. In the very next breath, appellant points out that since the assignments were forgeries, he at all times remained a joint tenant.

C. In Section V of his argument, appellant contends that defendant had actual knowledge of fraud in that defendant knew appellant was being excluded from a share in the dividends and stock rights.

In determining whether the trial court correctly determined in its Conclusion of Law XI that Section 1475 of the California Civil Code applied to protect defendant against the demands of plaintiff, fullest weight must be given to Finding XXVII [Tr. Rec. p. 57] (previously quoted herein) to the effect that defendant had no reason to believe any fraud was being or had been perpetrated upon appellant.

An interpretation of Section 1475 which would place on the obligor the burden of determining that there was no fraud in connection with, or *wrongful* exclusion from the benefits of, the obligation he was performing when performance is made to one of two or more joint obligees, is not warranted, if the obligor otherwise has no reason to believe there is any such fraud or *wrongful* exclusion. Plaintiff's proposed interpretation of this section would have exactly this effect, and would to a large extent, if not completely, nullify the provisions of the section. If any exception is to be made to the application of Section 1475 which is not within the express terms of the section, it should not go beyond that contained in Restatement of Contracts, Section 131, as quoted on page 36 of appellant's brief. Finding XXVII in the case at bar, precludes this exception. Even knowledge on the part of the obligor that one of the joint obligees is being excluded from the benefit of the performance made to another of the obligees, gives no notice to the obligor of fraud, in the absence of some reason on his part to believe such exclusion is wrongful.

The cases cited by opposing counsel do not lend any support to their proposed interpretation of Section 1475. In *Stark v. Coker,* 20 Cal. 2d 839, 129 P. 2d 390 (Sept.

28, 1942), the Supreme Court of California held that one of two joint tenant payees of a $12,000 note could not discharge the note as against the other payee "for $3,000, only half of which was paid in cash and the balance has not yet been paid." This result was reached because "Plaintiff had no knowledge of the purported accord and satisfaction and did not authorize it." The rule of this case is simply that one co-tenant has no authority to change or modify the obligation. This rule has no application in the case at bar.

The second case cited is *Cober v. Connolly,* 20 Cal. 2d 741, 128 P. 2d 519 (decided August 21, 1942; rehearing was denied September 14, 1942, two weeks before decision in the *Stark* case, *supra*). There one of the joint tenant payees of an $850.00 note had, without the knowledge or consent of the two others, agreed to accept "job printing, the publication of legal notices, hotel cards, and newspaper subscriptions, as ordered by him, in payment of the obligation." In pursuance of this arrangement, the maker of the note did printing and advertising to the value of $1,255, only $290 of which was for the payee, the remainder being for other persons. Only $25 to $30 was paid in cash. The trial court ruled that Section 1475 of the California Civil Code operated to constitute payment of the note and in affirming judgment on appeal, the Supreme Court held:

> "Section 1475 is, however, determinative of this appeal. 'An obligation in favor of several persons is extinguished by performance rendered to any of them. . . .' (Applied in *Bailes v. Keck,* 200 Cal. 697 [254 Pac. 573, 51 A. L. R. 930]; *Hoover v. Wolfe,* 167 Cal. 337 [139 Pac. 794]; *Delano v. Jacoby,* 96 Cal. 465 [31 Pac. 290, 31 Am. St. Rep.

201]; *Wright v. Mix,* 76 Cal. 465 [18 Pac. 645]; *Barnes v. Osgood,* 103 Cal. App. 730 [284 Pac. 975].) None of the California cases construing this section was decided upon facts such as those before the court in the present action, and it is true, as contended by the appellants that when one of two or more joint creditors accepts payment of the obligation, he holds the proceeds as a trustee or agent for them and is directly accountable to them as such. But so far as the debtor is concerned, the co-obligee is more than a mere agent; he is the owner of the obligation. 'Since each of several joint obligees is interested in the entire claim, he has the power to discharge the entire claim either by release or by accord and satisfaction, and so a payment or other performance of the whole obligation to one obligee discharges it; and a tender to one is legally a tender to all.' (2 Williston on Contracts [rev. ed. 1938], sec. 343, p. 1014 [and see cases there cited in footnotes 2, 3 and 4].) Section 130 of the Restatement of the Law of Contracts provides: 'Except as the rules of this Section are qualified by section 131 . . . a discharge by a joint obligee of his individual right operates as a discharge of the joint right of all.' Section 131 reads: '. . . A discharge of the promisor by an obligee in fraud of a co-obligee is inoperative to discharge the promisor's duty to the extent of the co-obligee's interest in the performance, if the promisor gives no value or knows, or has reason to know of the fraud.'

"The appellants do not claim that the Cobers did not give value, or that they had any knowledge concerning Eversole's failure to account to the other payees of the note. The fact that much of the printed matter went to others than Eversole, or that Ever-

sole made gifts of many subscriptions of Cober's newspaper, is immaterial, as all such services and supplies were ordered by Eversole with the understanding that they should be credited by him on the note. The performance of the services and the furnishing of the supplies effectually discharged Eversole's individual right against the respondents, and, under the general rule, also discharged the debt as to all of the obligees. The fact that the note was not surrendered to the maker is immaterial. (*Wheeler v. Bull,* 131 Cal. 421, 425 [63 Pac. 732].)"

Cober v. Connolly, 20 Cal. 2d 741, 744-745, 128 P. 2d 519 (also reported in 142 A. L. R. 367, with note on p. 371).

The *Cober* case presents a situation where the obligor must have known that two of the three joint tenant payees of the note were apparently being excluded from the benefit of the performance of his obligation. The court in deciding the case had in mind the exception to Section 1475 set out in Section 131 of Restatement of Contracts, as that very section is quoted in their opinion. This apparent exclusion becomes immaterial in the absence of knowledge by obligor of fraud, because the joint payee receiving performance "holds the proceeds as a trustee or agent" for the other payees "and is directly accountable to them as such." This principle applies in the case at bar.

The third case cited, *Lemiette v. Starr,* 66 Mich. 539, 33 N. W. 832, deals only with the partnership relation, there was no performance by the obligor, aside from the giving of a note for a pre-existing obligation and no reference is made whatever to the principle of law embodied in Section 1475, Civil Code.

We submit, therefore, that in the absence of reason on the part of the obligor to know of fraud, Section 1475 applies, and that the obligor is under no duty to the joint obligees when rendering performance to one of them to see to it that all share equally in the benefit of his performance.

D. Lastly, on this phase of the case, appellant in Section VII attributes to the defendant not only knowledge of fraud but actual concealment thereof, basing this upon his assumption that defendant knew that plaintiff was being wrongfully excluded and thereafter failed to furnish plaintiff with any information.

We are at some loss to understand what new or additional point opposing counsel seek to make therein, unless it is that plaintiff, as a stockholder, was himself entitled to receive directly from defendant notice regarding dividends and stock rights. Plaintiff's claim in this action is based upon and can only be based upon a contention on his part that he continued to be a holder in joint tenancy with Mrs. Price and Mr. Burton as to all stock involved. Section 1475, Civil Code, applies by its express terms not only to payment of money due joint obligees, but to the performance of "*an obligation*" thus due. "Obligation" is defined by Section 1427, Civil Code, as "a legal duty, by which a person is bound to do or not to do a certain thing." Any duty on defendant to give information or notice to these stockholders in joint tenancy was performed under the terms of Section 1475 by giving notice to any one of them. Mrs. Price, plaintiff's joint tenant. had such notice.

Even without reference to Section 1475, Civil Code, the courts, on the basis of common law principles, have reached

the same conclusion that a joint obligation when barred as to one is barred as to all co-tenants.

Ellis v. Columbine Creamery Co., 83 Cal. App. 48, 52(2), 256 Pac. 489;

Conrad v. Hawk, 122 Cal. App. 649, 652(2), 10 Pac. 534;

Robertson v. Burrell, 110 Cal. 568, 577, 42 Pac. 1086;

Sears v. Majors, 104 Cal. App. 60, 62-63, 285 Pac. 321;

14 Am. Jur. 147-148.

In so far as any other points are made in Section VII of appellee's brief, they are answered in other sections of this brief.

E. In each of said Sections II, IV, V and VII of plaintiff's brief, knowledge of fraud, either actual or constructive, has been attributed to defendant upon the ground that the stock assignments which were involved in the case of *Burton v. Hurley*, decided in the United States District Court for the District of Kansas, were, in fact, forgeries so far as the signature of plaintiff is concerned.

Defendant asserts that it is not bound by such judgment.

This defendant was not a party to said action [Tr. Rec. pp. 29-30].

Although the Kansas court found that the purported signature of the plaintiff herein as appearing in both the stock assignments and upon the dividend order relating to said stock were forgeries [Tr. Rec. pp. 87-88], the court below in this action, upon the evidence adduced herein, con-

cluded that the Kansas judgment was *res judicata* only as to the signatures on the assignments [Tr. Rec. p. 58] and found, as a fact, that, *contrary to the conclusion of the Kansas court, plaintiff did, in fact, sign the dividend order involved* [Tr. Rec. p. 37].

We think the basic law cannot be questioned that a judgment is binding or conclusive only upon those who are parties to the action in which the judgment is rendered and upon those who are in privity with a party thereto.

1 Freeman on Judgments, 5th Ed., Sec. 407.

This basic rule has frequently been applied in decisions of the California courts, reference to only a few of which is made herein.

Estate of Smead, 219 Cal. 572 at 577, 28 P. 2d 348;

Stockwell v. McAlvay, 10 Cal. 2d 368 at 371, 74 P. 2d 504;

Victor Oil Co. v. Drum, 184 Cal. 226 at 239, 193 Pac. 243;

Drummond v. Drummond, 39 Cal. App. 2d 418 at 424, 103 P. 2d 217;

Olinda Irrigation Lands Co. v. Yank, 27 Cal. App. 2d 56 at 64, 80 P. 2d 170.

Perhaps the most instructive decision arising out of facts similar in some respects to those in the instant case is that of *Perkins v. Benguet Consol. Mining Co.,* 55 Cal. App. 2d 720, 132 P. 2d 70. The facts involved in the *Perkins* case are as follows: Mrs. Perkins, the plaintiff, a resident of the State of Washington had married in the

Philippines in 1914. Her husband previously had been a resident of the State of New York. During approximately fifteen years of marriage, until their separation in 1929, they had acquired many thousands of shares of the defendant company, twenty-four thousand of which had been registered in the name of the plaintiff, and upon which shares dividends had always been paid directly to the plaintiff.

After separation of the parties, a dispute arose between them concerning these shares of stock and the dividends thereon and although Mrs. Perkins served numerous demands upon the defendant that dividends be paid to her, defendant, nevertheless, paid the same to the husband, taking several agreements of indemnity.

The next step was an action in the Philippines in which a judgment was entered against Mrs. Perkins and in favor of Mr. Perkins decreeing transfer to him of the shares in question. The shares of stock were deposited with a trust company in New York, and in 1933 Mr. Perkins sued the trust company pleading the Philippine judgment. Mrs. Perkins was made a party by the trust company and in this action it was ultimately determined that Mrs. Perkins was owner of the shares. Thereafter, the California action was brought by Mrs. Perkins against the defendant company for recovery of the dividends which had been paid after 1930. The ultimate decision in this case was that the decision of the New York court was *res judicata* and that the defendant company was bound thereby.

In at least two very important respects, the *Perkins* case must be distinguished from the case at bar. First, in the *Perkins* case, the defendant corporation had knowingly placed itself in privity with the husband by paying dividends to the husband under an agreement of indemnity with full knowledge at all times of the wife's claims. Second, in the *Perkins* case, the New York judgment dealt only with ownership of the stock as between the husband and wife. The award of dividends to the wife in the New York action as against the husband was solely an incident of the stock ownership.

Since, in the *Perkins* case, the corporation had elected to stand or fall on the rights of the husband and had taken indemnity from him, it, of course, should be bound by the judgment against the husband holding that he had no rights. The corporation was in privity with the husband in the New York action. As is specifically pointed out by the California court, the corporation was at all times, from the beginning of the controversy placed upon notice that the wife claimed the entire ownership of the stock and the right to all dividends thereon.

It is the law, that a judgment fixing ownership of property between two persons is an *in rem* judgment and is *res judicata* as to such ownership against any person not claiming a different title in himself.

The distinctions pointed out above were clearly recognized by the court in the *Perkins* case where it was said

"in the present case, none of the dividends were paid by the corporation to Mr. Perkins without knowledge of the claims of Mrs. Perkins," and further, "when every dividend was paid to Mr. Perkins or his transferee, the defendant knew of Mrs. Perkins' claims," and again, that the corporation "elected to pay these dividends to him and take back from him and his partner indemnity agreements to indemnify the company against the very loss it now faces."

Lastly, it should be pointed out that the California court conceded that had the defendant paid Mr. Perkins the dividends without knowledge of the claim of his wife, the New York judgment would not have been conclusive:

> "We can agree with defendant and with the assumption made in the Bernhard case [Bernhard v. Bank of America, 19 Cal. (2d) 807; 122 Pac. (2d) 892], that in such a case, where the depositary has paid one person without knowledge of another's claim, *a judgment between the two disputants would not be conclusive against the depositary.* As already pointed out, defendant here had full knowledge of the claims of Mrs. Perkins before it paid the dividends. No estoppel applies against her. No equities exist in favor of defendant." (Italics added.)

III.

Dividends Declared on Corporate Stock Held in Joint Tenancy Create a Debt Due From the Corporation to the Co-Owners as Joint Tenants and Section 1475, Civil Code, Applies to Such a Debt.

In Section III plaintiff devotes ten pages of his brief (pp. 21-30) to the proposition that a dividend declared by a corporation results in a debt due the stockholders which becomes a right separate and distinct from their rights as stockholders. There is no doubt as to the correctness of this proposition. It does not follow, however, that the debt resulting from the declaration of a dividend on stock held in joint tenancy is not due the joint tenants as joint tenants. In the absence of an agreed division of this debt which is an income from the joint tenancy property, the four unities of interest, title, time and possession still persist.

In *Fish v. Security-First National Bank,* 31 Cal. 2d 378, 189 P. 2d 10, the court said:

> "The conclusion of the trial court, therefore, that the joint tenancy transactions were valid and that defendant was the owner of a joint tenancy interest in the notes may be accepted as a premise in determining the further question whether the evidence sufficiently supports the correlative conclusion that the funds totaling $29,012.45 were also joint tenancy property, although standing in decedent's name. The proceeds of joint tenancy property, in the absence of

contrary agreement, retain the character of the property from which they are acquired (*In re Kessler,* 217 Cal. 32, 35 [17 P. 2d 117]; *Estate of Harris,* 169 Cal. 725 [147 P. 967]; *Bliss v. Martin,* 74 Cal. App. 2d 500 [P. 2d 61], and cases there cited; *Wallace v. Riley,* 23 Cal. App. 2d 654, 665 [74 P. 2d 800]; *Estate of McCoin,* 9 Cal. App. 2d 480, 482 [50 P. 2d 114])."

Fish v. Security-First National Bank, 31 Cal. 2d 378, 387(5), 189 P. 2d 10;

In re Kessler, 217 Cal. 32, 35, 17 P. 2d 117;

Estate of Zaring, 93 A. C. A. 717, 719, 209 P. 2d 642.

In the *Zaring* case, the proceeds involved was rent from real property, which, as in the case of a dividend declared on stock, would not pass to a purchaser on the sale of the property from which the income is derived. But in spite of this severance, it was held such proceeds "retain the character of the property from which they were acquired."

The two English equity cases cited by opposing counsel, if indeed they are contrary to the California cases and Section 1475, Civil Code, can have no force in the case at bar.

IV.

Dividends, When Declared on Corporate Stock and, Stock Rights, Are Not a "Deposit" Within the Meaning of Section 1475, Civil Code.

In Section VI of his brief plaintiff seeks to avoid the application of Section 1475, Civil Code, by contending that dividends when declared and rights to subscribe to stock are "deposits" with the meaning of that term as used in Section 1475. The "deposits" expressly referred to in this section are those "regulated by the title on deposit." Title III of Division 3, Part IV (Secs. 1813 to 1881.3) is part of the code referred to. Reference to this Title clearly indicates that dividends and stock rights do not fall with the category of "deposits."

The sections of said code defining various types of deposits are as follows:

> Sec. 1813. *Deposit, kinds of.* A deposit may be voluntary or involuntary; and for safekeeping or for exchange.
>
> Sec. 1814. *Voluntary deposit, how made.* A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary.
>
> Sec. 1815. *Involuntary deposit, how made.* An involuntary deposit is made:
>
> 1. By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner; or,
>
> 2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the

owner of personal property committing it, out of necessity, to the care of any persons.

Sec. 1817. *Deposit for keeping, what.* A deposit for keeping is one in which the depositary is bound to return the identical thing deposited.

Sec. 1818. *Deposit for exchange, what.* A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited.

Opposing counsel have been unable to produce any case holding that a dividend declared by a corporation is a deposit. They do not even indicate in their brief which of the various types of deposits defined in the code, they conceive defendant's obligation to be. Their argument seems to be that wherever a trust relationship exists there must be a "deposit." We find no authorities supporting this position.

V.

The Facts Herein Do Not Warrant Modification of the General Rule That Interest on Dividends Accrues Only From Date of Demand.

In Section VIII of his argument appellant contends blandly that any demand which he might have made for dividends or for issuance of stock rights would have been entirely fruitless and that, therefore, should he be entitled to recovery herein, he would be entitled to interest from the time the dividends were declared or the stock rights issued.

In connection with this matter, the trial court, in its Conclusion of Law IX [Tr. Rec. p. 62], found that plaintiff's cause of action asserted herein did not accrue until October 15, 1945, the date of his demand upon the defendant. With this conclusion plaintiff apparently agrees so far as the Statute of Limitations is concerned. In the accompanying Conclusion of Law XII [Tr. Rec. p. 63] the court holds that plaintiff would not be entitled to interest until that date. Certainly no interest should be allowed until the cause of action accrued.

Appellant points to no finding of the trial court that an earlier demand for payment of dividends or issuance of stock rights would have been disregarded, and in fact no such finding was made. On the other hand, it appears herein that defendant continued to pay dividends and issue stock rights to Mrs. Price *only* up to the date it received from plaintiff notice under date of March 20, 1944 [Tr. Rec. pp. 26-29]. It is to be noted that no question exists as to dividends declared after said date or any interest thereon.

Apparently, plaintiff concedes that in the absence of evidence of circumstances showing clearly that any demand would have been fruitless, the right to interest accrues only after such demand is made.

Perkins v. Benguet Consolidated Mining Co., 55 Cal. App. 2d 720 at 765, 132 P. 2d 70 at 99.

VI.

Conclusion of Law XI [Tr. Rec. p. 62] Is Not in Error:

1. **In View of the Fact That There Is No Finding That Plaintiff Was a Minor at Any Time Defendant Rendered Performance to Plaintiff's Co-Tenant.**
2. **In View of the Fact That Plaintiff Has Ratified His Status as a Joint Tenant.**
3. **For the Reason That Section 1475, Civil Code, Applies as Against a Minor Joint Tenant.**

In reply to Section IX of plaintiff's brief we desire to point out that it appears from the findings that plaintiff was 20 years old at the time 575 shares of defendant's common stock was issued to him and his co-joint tenants on November 20, 1928 [Finding XIV p. 45, XXII p. 54]. The dividends and stock rights here involved did not begin to accrue until some time in the year 1929 [Findings of Fact XI p. 43, XIX pp. 51 and 52, XXVIII p. 57]. Even if plaintiff was not 21 years of age the early part of 1929 he must at least have reached that age some time during the year 1929 and was not therefore a minor during a large portion of the period here involved. He clearly cannot escape the application of Section 1475 after reaching his majority.

Furthermore, even though plaintiff did not know of the conveyance of this stock to him as a joint tenant at the time it was thus conveyed when he was 20 years of age

[Finding XXIII pp. 54 and 55], it appears from the record that after attaining majority he ratified the conveyance of this stock to him as a joint tenant with two others both by his actions in making claims against his co-tenant Mr. Burton and by the bringing of the action now before this court.

In his cross-petition in the case of *Burton v. Hurley,* he based his claim against Burton on his status as a joint tenant [Tr. Rec. p. 71] and the court found in his favor on this theory [Tr. Rec. p. 87]. So far as his right is concerned to disaffirm the conveyance made to him as a co-joint tenant, it was either to repudiate entirely the conveyance or to accept it as made. Obviously he has followed the latter course and is now bound by that election.

The legal effect of ratification of an infant's contract "is the same as though there never was a power of avoidance—as though the agreement was absolutely binding from the beginning." (27 Am. Jur. 802, Sec. 73.) He is not at liberty to affirm a portion of a single transaction which he deems advantageous to him and disaffirm the rest.

Peers v. McLaughlin, 88 Cal. 294, 26 Pac. 119.

We submit therefore that having ratified the conveyance to him of this stock as a joint tenant after reaching majority, he is bound by all the rules of law applicable to joint tenancy; and these principles, in view of his ratification, apply with equal force to the period, if any, during which he was a minor as well as to subsequent periods after he had reached majority.

Plaintiff cites Section 33 of the California Civil Code to the effect that "a minor cannot give a delegation of power" in his attempt to prevent the application of Section 1475, Civil Code.

In *Ridley v. Young,* 64 Cal. App. 2d 503, 513, 149 P. 2d 76, the court in holding that Section 402 of the California Vehicle Code applied to both adults and minors, Section 33 Civil Code, notwithstanding, said:

> "If the Legislature had intended to exclude minors from its application it would have been easy to have so stated."

In so far as plaintiff's co-tenants during his minority were trustees or agents for him under the theory announced in *Cober v. Connolly,* 20 Cal. 2d 741, such trusteeship or agency was not one created by a delegation of power given by a minor, but on the contrary was one created by law.

We will hereafter point out in subheading I of Division Two of our brief that Section 1475, Civil Code, applies to minor joint tenants as well as to adults.

DIVISION TWO.

APPELLEE'S SPECIFICATIONS OF ERRORS.

By its Conclusion of Law XII [Tr. Rec. p. 63] the trial court held that if Section 1475, Civil Code, were not applicable, plaintiff would be entitled to recover in this action. This ruling on the part of the court resulted from its conclusion that on the basis of its Findings of Fact the other defenses relied upon by defendant were not sound as a matter of law. However, if on the basis of the findings as made by the trial court, defendant as a matter of law was entitled to judgment, the judgment here appealed from must be affirmed. On this point, this court in *Town of South Tucson v. Tucson Gas, Electric Light & Power Co.,* 149 F. 2d 847(1), said:

> ". . . we are required to seek support of the judgment appealed from upon any ground disclosed in the record."

Accord are:

L. McBrine Co., Ltd. v. Silverman, 121 F. 2d 181, 182(3);

Elizabeth Arden Sales Corp. v. Blass Co., 150 F. 2d 988, 993(7.8), cert. denied 326 U. S. 773;

5 C. J. S. 1334, Sec. 1849.

I.

Conclusions of Law V, VI, VII and VIII [Tr. Rec. pp. 60-61] Are Erroneous Insofar as They Hold Plaintiff Entitled to Recover Dividends From Defendant Since the Dividend Orders Signed by Plaintiff Were Valid Until Cancelled.

II.

Conclusion of Law IX [Tr. Rec. p. 62] Is Erroneous in Holding That Plaintiff's Cause of Action Did Not Accrue Until October 15, 1945, and Was Therefore Not Barred by California Code of Civil Procedure, Section 337, Subdivision 1, or Section 339 Subdivision 1.

ARGUMENT.

I.

Conclusions of Law V, VI, VII and VIII [Tr. Rec. pp. 60-61] Are Erroneous Insofar as They Hold Plaintiff Entitled to Recover Dividends From Defendant Since the Dividend Orders Signed by Plaintiff Were Valid Until Cancelled.

The trial court found that plaintiff, not later than December 11, 1928, signed, at the age of twenty years, dividend orders directing defendant to pay all dividends on stock in which he held a joint tenancy interest to his co-tenant, Mrs. Price [Findings of Fact VI and VII, Tr. Rec. pp. 36-40], but held that these orders "were voidable . . . at the election of said minor within a reasonable time after reaching his majority" [Conclusion of Law V, Tr. Rec. p. 60] and that disaffirmance "was made within a reasonable time after reaching his majority" [Conclusion of Law VII, Tr. Rec. p. 61]. Finding of Fact XXIV [Tr. Rec. p. 55] shows this disaffirmance was made

March 20, 1944, after Mrs. Price's death and some time after all other matters on account of which plaintiff seeks a recovery herein had occurred. Conclusion of Law VIII is to the effect that plaintiff was entitled to receive one-third of all dividends up to the time of the death of Mrs. Price. Insofar as this is a holding that plaintiff was entitled to receive these dividends directly from defendant, it is in error.

Defendant's claim is that these dividend orders were valid until cancelled or disaffirmed and gave full protection to it in its dealings with Mrs. Price, and that no disaffirmance by plaintiff after Mrs. Price's death could have any retroactive effect.

On their face, these dividend orders are nothing more than directions given by joint obligees to their debtor as to how the debtor shall perform its obligations as such, directed to the debtor at "Los Angeles, California," and to be performed at Los Angeles. Section 1476 of the California Civil Code clearly applies to these orders. It reads as follows:

> "Effect of directions by creditors. If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance."

This section has been construed in *Cober v. Connolly,* 20 Cal. 2d 741, 128 P. 2d 519, wherein it is stated at page 744 as follows:

> "Section 1476 was enacted in 1872, but has never been construed by an appellate court of this state. The wording of the section is identical with that of

section 702 of the Field Draft of the Civil Code of New York, enacted in 1865. The Code Commissioners of New York, in their ninth and final report, said of the provision: 'Thus, if the creditor directs money to be sent to him by mail, it is at his risk (Graves v. Amer. Exch. Bank, 17 N. Y. (205) 207; Eyles v. Ellis, 4 Bing. 112).' In a preliminary draft of the same code prepared by the code commissioners in 1862 and submitted for examination prior to revision, the section read: 'Payment is complete, and the debt extinguished, upon the debtor's making payment in the manner directed by the creditor, even though the thing paid should never reach the creditor.' The code commissioners based the wording of this section on the two cases cited in the annotation to the final draft of 1865. From this legislative history, it is apparent that the statute was directed to the manner of transmission and not to the payment of something other than originally bargained for by the parties to the agreement."

Cober v. Connolly, 20 Cal. 2d 741, 744, 128 P. 2d 519.

We submit these dividend orders are directions to defendant as "to the manner of transmission" of the payments of such dividends, and defendant's obligation to pay the dividends as directed is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance. An infant creditor over eighteen years of age whose claim is thus paid in full has no right of disaffirmance which would entitle him to be paid a second time (Cal. Civ. Code, Sec. 35), and has the same rights and obligations under Section 1476 of the Civil Code as any other creditor. Both of Sections 1475 and

1476 on common law principles apply to minors. A joint right barred as to adults is also barred as to minors.

Sears v. Majors, 104 Cal. App. 60, 62-63, 285 Pac. 321;

Haro v. S. P. R. R. Co., 17 Cal. App. 2d 594, 62 P. 2d 441;

Gates v. Wendling Nathan Co., 27 Cal. App. 2d 307, 315, 81 P. 2d 173;

and payment to one of several joint obligees is payment to all even though some are minors.

Bank of Guntersville v. U. S. Fidelity etc. Co., 201 Ala. 19, 75 So. 168.

The trial court held "the validity of the dividend orders is to be determined by the law of Missouri where plaintiff executed them." [Tr. Rec. p. 61.] Although it may be immaterial whether the law of California or that of Missouri controls as to this matter, we submit that the court's conclusion is in error. The dividend orders were delivered to defendant in California and called for performance there, and were acted upon by way of acceptance of these orders by defendant in that state. The orders related to stock in a California corporation, with its principal place of business in that state [Tr. Rec. p. 35]. Under these circumstances the following sections from Restatement, Conflict of Laws, and not those cited by the trial court, apply:

"Sec. 183. Participation in Management and Profits.

The right of a shareholder to participate in the administration of the affairs of the corporation, in the division of profits and in the distribution of assets

on dissolution and his rights on the issuance of new shares are determined by the law of the state of incorporation.

"Sec. 355. PLACE OF PERFORMANCE.

The place of performance is the state where, either by specific provision or by interpretation of the language of the promise, the promise is to be performed.

"Sec. 361. WHAT AMOUNTS TO PERFORMANCE.

The law of the place of performance determines the details of the manner of performing the duty imposed by the contract.

"Sec. 366. PERSON TO WHOM PERFORMANCE RENDERED.

The law of the place of performance of a contract determines the person to whom performance shall be rendered."

Section 1646, Civil Code, is to the same effect.

The question of the competency of a minor stockholder to order payment of dividends accruing on his stock to be made to another person is fundamentally no different from his right to assign and transfer the stock itself. The only two cases we have found dealing with this question hold that the corporation issuing the stock held by a minor is fully protected in recognizing such an assignment made by the minor.

Casey v. Kastel, 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995;

Carolina Telephone & Telegraph Co. v. Johnson, 168 F. 2d 489, 3 A. L. R. 2d 870.

The results reached in these two cases was provided for in California by Section 328e, Civil Code, which was added

to the code in 1931, effective August 14, 1931 (but now found with immaterial changes in Corporations Code as Section 2413). This section reads as follows:

> "Neither a domestic corporation nor a foreign corporation keeping transfer books in this State shall be or become liable to a minor or incompetent person in whose name shares are of record on its books because of their transfer on its books at the instance of such minor or incompetent or the recognition of or dealing with such minor or incompetent as a shareholder whether or not such corporation shall have had notice, actual or constructive, of the nonage of such minor or of such incompetency."

This section, of course, can have no application to any payments made by defendant in this case prior to the effective date of this new section in 1931. But we see no reason why it is not applicable to payments made after its effective date under a dividend order signed by a minor stockholder before the passage of this code amendment where, as here, the order is expressly continuous in its operation until countermanded. Such an order is the equivalent of a new and additional order given with respect to each and every new dividend as declared. Even if such orders were given by a minor prior to the effective date of this new code section, it is clear that the corporation would be protected in making payments after the effective date in accordance with the terms of the orders given by its minor stockholders. This situation is analogous to a continuing guaranty

which is in effect until revoked (Cal. Civ. Code, Secs. 2814 and 2815). Surely an infant who is a guarantor under such a continuing guaranty is under the necessity of revoking his guaranty if he is to escape liability on credits extended by the party to whom the guaranty is made after such infant reaches majority.

There are many cases holding that a debtor of a minor may, on order from the minor, pay the debt to a third person and that such payment discharges the debt to the minor. This question arises in connection with checks drawn by minors on bank accounts standing in their names and in cases where minors have endorsed negotiable or non-negotiable notes. Even in the absence of statutory provisions, a bank is protected in honoring a check drawn by an infant on an account standing in the infant's name.

Smalley v. Central Trust & Savings Co., 72 Ind. App. 296, 125 N. E. 789;

Phillips v. Savings Trust Co. of St. Louis, 231 Mo. App. 1178, 85 S. W. 2d 923, 926;

Hastings v. Dollarhide, 24 Cal. 195;

Taylor v. Hill, 115 Cal. 143, 44 Pac. 336;

10 C. J. S. 684;

43 C. J. S. 195.

At the bottom of page 63 of his brief plaintiff makes the contention that the dividend orders "are also held to be void *ab initio* under the law of Missouri." Although not elaborating on any theory on which the dividend

orders signed by plaintiff would be void, the authorities cited seemed to indicate that plaintiff's position is that these dividend orders were in the nature of a delegation of authority by a minor and as such are void for the reason that a minor cannot appoint an agent. This contention was made in the trial court, but the trial court held merely that the orders were voidable [Conclusion of Law V, Tr. Rec. p. 60].

As against this defendant, having no knowledge of fraud practiced on plaintiff, nothing should be read into these dividend orders that does not appear on their face or by necessary implication. We submit that on their face they are nothing more than an express indication made by the joint tenants that they desired defendant to make payment of dividends to one of their number in accordance with the provisions of Section 1475 of the Civil Code. These orders also, as we have heretofore pointed out, fall within the provisions of Section 1476 of the Civil Code. If they are to be construed as anything more than this, which we doubt, they are possibly in the nature of assignments. There are cases holding that orders of similar effect do operate as valid assignments:

Wheatley v. Strobe, 12 Cal. 92, 73 Am. D. 522;

Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462;

McEwen v. Johnson, 7 Cal. 258;

Donohue-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183, 187 to 189, 71 Pac. 93;

Title Insurance & Trust Co. v. Williamson, 18 Cal. App. 324, 123 Pac. 245;

Cannon v. Chapman, 24 Cal. App. 2d 448, 75 P. 2d 522.

In the article on assignments in Corpus Juris Secundum, it is stated:

"The assignment of a fund may be in the form of an order on the debtor or holder thereof to pay the debt or fund of another person."

6 C. J. S. 1097.

See also:

6 C. J. S. 1114, Sec. 61.

In order to construe these dividend orders [Tr. Rec. pp. 38 to 40] as an appointment of an agent, something must be read into the orders that is obviously not there and does not arise by necessary implication. There is nothing in the record to warrant the assumption that these dividend orders were intended by the plaintiff or by those who secured his signature thereon that the orders were intended to operate as an appointment of an agent.

On the basis of the theories above cited, we submit that these dividend orders given by plaintiff to defendant were not in the nature of an appointment of an agent by a minor and that they were valid, so far as this defendant was concerned, until they were cancelled, and that they are not, so far as this defendant is concerned, subject to any retroactive disaffirmance by plaintiff.

II.

Conclusion of Law IX [Tr. Rec. p. 62] Is Erroneous in Holding That Plaintiff's Cause of Action Did Not Accrue Until October 15, 1945, and Was Therefore Not Barred by California Code of Civil Procedure, Section 337, Subdivision 1, or Section 339, Subdivision 1.

In its answer herein, defendant set up as separate defenses the provisions of California Code of Civil Procedure, Section 339, subdivision 1, and Section 337, subdivision 1.

The first section referred to provides that any action upon an obligation not founded upon an instrument in writing must be commenced within two years while the second section provides that an action upon any obligation founded upon an instrument in writing must be commenced within four years.

As to a stockholder of record, it is the law in California that the resolution declaring the dividend is a writing and that consequently, the four year Statute of Limitation applies thereto. In the case of an action by a person not a stockholder of record, the two year Statute of Limitation would apply (*Perkins v. Benguet Consolidated Mining Co.,* 55 Cal. App. 2d 720 at 771, 132 P. 2d 70).

The court below held, in its Conclusion of Law IX, that neither limitation applied since his cause of action did not accrue until October 15, 1945, the date fixed as his demand for payment.

Section 352 of the California Code of Civil Procedure provides that when a cause of action accrues to a minor, the period of his minority is not a part of the time limited for the commencement of the action. In the case at bar,

as already pointed out, plaintiff attained his majority some time in the year 1929. Therefore, at least by the year 1930, the plaintiff was twenty-one years of age and was bound to disaffirm any actions taken by him while he was a minor within a reasonable time.

It has been held in numerous cases that such reasonable time may not exceed the period of the Statute of Limitations otherwise applicable to the case.

Lanning v. Brown (Ohio), 95 N. E. 921;
Urban v. Grimes, 2 Grant Cas. (Pa.) 96;
Drake v. Ramsay, 5 Ohio 252;
O'Donohue v. Smith, 114 N. Y. Supp. 536;
Sternlieb v. Normandie (N. Y.), 188 N. E. 726;
Chicago Telephone Co. v. Schultz, 121 Ill. App. 573;
Blake v. Hollingsworth, 76 S. E. 814;
Putall v. Walker, 55 So. 844;
Mourant v. Pullman T. & S. Bank (Ill.), 41 N. E. 2d 1007;
Wright v. Buchanan (Ill.), 123 N. E. 53.

In the case last cited the court summarizes the rule as follows:

> "In order to take advantage of minority in refusing to carry out a contract, the weight of authority is that the contract executed by the infant must be repudiated after the infant becomes of age within the Statute of Limitations."

The fact that a claimant does not know of the existence of a cause of action in his favor, or the fact that the existence of such a cause of action has been concealed from him, does not suspend operation of the Statute of

Limitations unless the defendant sought to be charged is guilty of concealment (*Gibson v. Henley,* 131 Cal. 6, 63 Pac. 61, in which case the statute was held to run where the defendant did not know of his partner's fraud).

Rose v. Dunk-Harbison Co., 7 Cal. App. 2d 502 46 P. 2d 242.

Ignorance of cause of action does not toll statute.

Bills v. Silver King, etc., 106 Cal. 9, 39 Pac. 43;

Aronson v. Bank of America, 42 Cal. App. 2d 710, 109 P. 2d 1001;

Coy v. E. F. Hutton Co., 44 Cal. App. 2d 386, 112 P. 2d 639.

It is the general rule that a fraudulent concealment of a cause of action must be attributable to the person sought to be charged in order to prevent the running of the statute.

2 Wood on Limitations (2nd Ed.), Sec. 276, p. 712;

Wood v. Williams, 142 Ill. 269, 31 N. E. 681;

Wilson v. Williams (Ill.), 33 N. E. 884.

In view of the finding in the court below that this defendant had no knowledge or reason to believe that any fraud had been practiced upon the plaintiff, we submit that the operation of the Statute of Limitations is not to be tolled or suspended. Plaintiff should be held bound to disaffirm any actions taken while he was a minor within a reasonable time thereafter which period of time must be the applicable Statute of Limitation. No concealment or fraud having been practiced by this defendant, plaintiff's cause of action must have been barred long prior to the commencement of this action on March 6, 1946.

Conclusion.

The controlling question presented upon this appeal by plaintiff is whether the provisions of California Civil Code, Section 1475, apply. Plaintiff in effect concedes in his argument that said section would apply unless defendant had knowledge, actual or constructive, of the asserted fraud practiced upon him. The trial court below, upon all the evidence, expressly found that this defendant had no knowledge, or any reason to suspect, that a fraud was being practiced.

Therefore, the judgment should be affirmed.

Respectfully submitted,

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